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MICHAEL RODAK, JR.,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-5306

ERNEST JOHN DOBBERT, JR.,

Petitioner,

against

STATE OF FLORIDA,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF FLORIDA

BRIEF OF RESPONDENT

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PRELIMINARY STATEMENT

Respondent will adopt the following reference system:

"A" for the Printed Appendix

"R" for the Record on Appeal

"TR" for the Transcript of Trial

"CV" for the Hearing on Change of Venue

"JA" for the Advisory Jury Proceeding.

Appendices to the Petition and Response will be referred to by letter and page. Pretrial proceedings will be referred to by volume and page.

Pursuant to Rule 40, Rules of United States Supreme Court, Respondent will not include in this brief: (1) references to the official report of the court below; (2) a jurisdictional statement; or (3) a reference to statutes or constitutional provisions involved in the case.

QUESTIONS PRESENTED

Whether the imposition of the death penalty as to this petitioner, pursuant

to a Florida Statute passed subsequently to the date of the alleged offense for which the petitioner was convicted, was a violation of the constitutional prohibition against ex post facto laws and a denial of equal protection of the laws.

Whether the totality of the circumstances surrounding the petitioner's trial shows inherent prejudice in the pre-trial setting and jury selection process to the extent that the petitioner was denied due process of law.

STATEMENT OF THE CASE AND FACTS

Respondent would augment Petitioner's factual recitation by reference to the facts found by the trial Judge and fully supported by the record including Petitioner's recorded statements.(TR 2247, 2247-2248, 2262-2268):

"'The evidence and testimony showed premeditated and continuous torture, brutality, sadism and unspeakable horrors committed against all of the children over a period of time. The crimes were committed against the children constantly and it is difficult to separate the specific acts against the individual child. What was done to one--short of causing blindness and murder--was done to all. However, the Court has set forth below some of the cruel and brutal acts against Kelly Ann--in so far as trial notes and memory of testimony serve me correctly.

"'Over the period of time of the later portion of Kelly Ann's short, tortuous life the defendant did these things to her on one or many occasions:

1. Beat her in the head until it was swollen.

2. Burned her hands.

3. Poked his fingers in her eyes.

4. Beat her in the abdomen until 'it was swollen like she was pregnant.'

5. Knocked her against a wall and 'when she fell, kicked her in the lower part of the body.'

6. Held her under water in both the bath tub and toilet.

7. Kicked her against a table which cut her head--then defendant sewed up her wound with needle and thread.

8. Scarred her head and body by beating her with a belt and board-- causing marks from her cheek, across the neck and down her back--which injuries worsened without treatment 'until the body juices came out'.

9. On one occasion beat her continuously for 45 minutes.

10. On many occasions kicked her in the stomach with his shoes on, and on the night she died he kicked her a number of times.

11. Kept her out of school so that the many scars, cuts and bruises on her body would not be seen by others.

12. Defendant made no effort to get professional medical care and attention for the child and in fact actively prevented any outsiders from discovering her condition.

13. Choked her on the night she died and when she stopped breathing he placed her body in a plastic garbage bag and buried her in an unmarked and unknown grave.'" (A 47-48)

The trial Judge aptly concluded:

"'I am not easily shocked or affected by tragedy or cruelty--but this murder of a helpless defenseless and innocent child is the most cruel, atrocious, and heinous crime I have every[sic] personally known

of--and it is deserving of no sentence but death.'"(A 49)

With regard to voir dire, the Florida Supreme Court found:

"* * * As further evidenced by the record, seventy-eight prospective jurors were interviewed; allowed thirty-two peremptory challenges, the defense only exercised twenty-seven.* * *."(A 64)

SUMMARY OF ARGUMENT

Petitioner has not been subjected to an ex post facto law because the Florida statute relating to capital offenses does not increase the punishment retroactively. The punishment was death or life in prison when Petitioner committed the crime and it remains death or life in prison. To the extent that the new statute precludes parole for twenty-five years on a life sentence, it has been authoritatively construed to be prospective only. The

new statute affects only the procedure by which the death penalty is to be imposed, and thus is not a substantive change. Petitioner had no right to the application of any procedure other than that in effect at the time of his trial.

It is not irrational to apply the procedure in effect at time of trial. Nor does it violate the ex post facto prohibition by altering defendant's situation to his disadvantage, since in fact it gives him three chances at a life sentence where formerly he had only one. It cannot even be said with any degree of assurance that the change in procedure prejudiced Petitioner, because we can only speculate as to what recommendation the jury would have made under the old procedure.

Petitioner has not been denied equal protection. He has not demonstrated that he has been treated differently than any

other Florida defendant whose offense was capital when committed and who stood trial after the procedural change in the Florida statute. That Petitioner did not stand trial sooner can only be attributed to his own efforts to avoid the consequences of his neinous conduct.

Petitioner has also failed to demonstrate that prospective jurors in Jacksonville, Florida, were exposed to any publicity with a capacity to prejudice their ultimate decision or that it was impossible to select a fair and impartial jury in his case. Rather, the record demonstrates to the contrary.

THE IMPOSITION OF THE DEATH PENALTY AS TO THIS PETITIONER, PURSUANT TO A FLORIDA STATUTE PASSED SUBSEQUENTLY TO THE DATE OF THE ALLEGED OFFENSE FOR WHICH THE PETITIONER WAS CONVICTED, WAS NOT A VIOLATION OF THE CONSTITUTIONAL PROHIBITION AGAINST EX POST FACTO LAWS AND A DENIAL OF EQUAL PROTECTION OF THE LAWS.

The Ex Post Facto Argument

Petitioner says he is the victim an ex post facto law because he was sentenced under a procedure not in effect when the crime occurred. He cites *Calder v. Bull*, 3 U S 386, 3 Dall 386 (1798).

Respondent concedes the rule of that case that a law is ex post facto if it changes the punishment and inflicts a greater punishment than that provided by law when the crime occurred. But that rule cannot avail Petitioner. His offense was punishable by death when he did it, and death when he stood trial, so that

potential punishment was not increased, *Miller v. State*, 332 So.2d 65 at 67 (Fla. 1976).

Petitioner suggests that he was potentially subjected to the possibility of a life sentence without possibility of parole for twenty-five years, even though he did not receive such a life sentence. He is clearly mistaken in this argument, because the new provision to that effect was authoritatively construed in *Lee v. State*, 294 So.2d 305 at 307 (Fla. 1974), to be prospective only. That construction precludes any possible argument that the new procedure is ex post facto because of the provision relating to parole.

Unless changes in procedure affect substantive rights, they may be applied to prior offenses. See *Beazell v. Ohio*, 269 U S 165 (1925), where the change resulted

in joint trial for codefendants, and *Malloy v. South Carolina*, 237 U S 180 (1915), where the method of execution of the death penalty changed. In *Hopt v. Utah*, 110 U S 574 (1884), this Court considered the application of a provision removing the incompetency of convicted felons as witnesses in criminal cases to an offense committed prior to the statutory change. Obviously, the change worked to the disadvantage of Hopt, since it provided an additional prosecution witness. Equally obviously, it could have redounded to the benefit of a defendant by providing previously unavailable defense testimony. In rejecting Hopt's ex post facto argument, this Court said:

> "* * * Statutes which simply enlarge the class of persons who may be competent to testify in criminal cases are not *ex post facto* in their application to prosecutions for crimes committed

prior to their passage; for they do not attach criminality to any act previously done, and which was innocent when done; nor aggravate any crime therefore committed; nor provide a greater punishment therefor than was prescribed at the time of its commission; nor do they alter the degree, or lessen the amount or measure, of the proof which was made necessary to conviction when the crime was committed.

"The crime for which the present defendant was indicted, the punishment prescribed therefor, and the quantity or the degree of proof necessary to establish his guilt, all remained unaffected by the subsequent statute. Any statutory alteration of the legal rules of evidence which would authorize conviction upon less proof, in amount or degree, than was required when the offense was committed, might, in respect of that offense, be obnoxious to the constitutional inhibition upon *ex post facto* laws. But alterations which do not increase the punishment, nor change the ingredients of the offense or the ultimate facts necessary to establish guilt, but--leaving untouched the nature of the crime and the amount or degree of proof essential to conviction--only remove existing restrictions upon the competency of certain classes of persons as witnesses, related to modes of procedure only, in which no one can be said to have a vested right, and

which the State, upon grounds of public policy, may regulate at pleasure. Such regulations of the mode in which the facts constituting guilt may be placed before the jury, can be made applicable to prosecutions or trials thereafter had, without reference to the date of the commission of the offence charged." 110 U S at 589-590

In just the same fashion, a change in who determines punishment may work to the disadvantage of an individual defendant, such as Petitioner, but may also work to the advantage of other defendants, so is not ex post facto. In *James v. Twomey*, 466 F.2d 718 at 721 (7th Cir. 1972), the court rejected the notion that a change from jury to judge in determining punishment would be ex post facto, saying:

"Petitioner also contends that since the law in Illinois was changed to petitioner's substantial disadvantage after the commission of the offense, it is an *ex post facto* law, prohibited by Article I, Section 10 of the United States Constitution.

Within the context of this case, it is certainly not clear that the statute as changed, even absent the 'savings clause,' made more onerous the punishment to which a defendant found guilty of rape would be exposed. Under the old code, if defendant were found guilty in a trial by jury, the jury would fix a term of imprisonment which could extend from one year to life. Under the new code the trial judge is given the responsibility of fixing an indefinite term of imprisonment, the minimum term being no less than one year, and the maximum being life. This is certainly distinguishable from the situation encountered in Lindsey v. Washington, 301 U.S. 397 S.Ct. 797, 81 L.Ed. 1182 (1937), in which the newly enacted statute required that what was merely a maximum under the old statute be mandatory term with a possibility of parole.* * *." at 721

See also *Donald v. Jones*, 445 F.2d 601 (5th Cir. 1971), cert.den. 404 U S 992.

In *Marion v. State*, 29 N W 911 at 918-920 (Neb. 1886), the court rejected the argument that a statute making the jury the judge of the facts only could not be

applied to an offense committed at a time when the jury was the judge of both the law and the facts, stating at 919:

> "The phrase, 'the manner of procedure for the enforcement or imposition of all such punishments,' clearly includes the provision of the former statute to which we have referred. The procedure only has been changed. The degree of punishment, the character of the offense, and the rules of evidence, remain as under the former law. It may be observed that the only change in the law is to provide another tribunal to pass upon the law of the case. Prior to the change, if the words in the former Code are to be taken at their full meaning and import, the jury were the judges as to the law of the case on trial. After the change, the courts sits in that capacity, and is the judge of the law. No vested right of plaintiff in error is affected. A new tribunal may be erected, or a new jurisdiction given to try him, and no right is abridged.* * *." at 919

Superficially, *Winston v. State*, 198 S E 667 (Ga. 1938), may appear to be to the contrary, but in fact it is not. The crime

was robbery by force or violence, and the former statute prescribed death as the punishment unless the jury should recommend mercy, which reduced the penalty to life in prison. However, the jury also had the option of recommending a sentence of four to twenty years, or that the accused be punished as for a misdemeanor. (198 S E at 669) The new statute provided only the options of death or life in prison. Not surprisingly, the new procedure was held to be ex post facto, since it took away substantial rights, and significantly restricted the range of allowable punishments by eliminating everything below life in prison.

Florida's procedure does not diminish the power of the jury to similarly mitigate the charge against the accused. That power comes through required instructions on

degrees and lesser included offenses, which the Florida Supreme Court has recognized as inherently allowing jury pardons, *Bailey v. State*, 224 So.2d 296 at 297 (Fla. 1969). Petitioner's jury was instructed (TR 2522, 2544-2545) and reinstructed (TR 2562-2568), in this regard, and in fact returned a verdict for one lesser degree of homicide and one lesser offense. (TR 2637-2638)

It cannot be said that Florida's new procedure reduces the possibility of mercy. In fact, it is enhanced. Where only the jury could grant mercy in the past, Petitioner had the possibilities of 1) a jury recommendation which though not binding can only be set aside on facts so clear no reasonable person could differ, *Tedder v. State*, 322 So.2d 908 (Fla. 1975)[1],

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1. Of the twelve cases reviewed by the

2) mercy from the trial judge[2] and 3) reduction of sentence in the Supreme Court.[3]

Florida Supreme Court, in which a jury recommendation of mercy was overruled, only four have been affirmed. They are reviewed in Justice England's concurring opinion in *Provence v. State*, 337 So.2d 783 at 787 (Fla. 1976). Eight other defendants have received life sentences, including *Chambers* (339 So.2d 204) *Provence, supra, Jones* (332 So.2d 615), *Thompson* (328 So.2d 1), *Tedder, supra, Swan* (322 So.2d 485), *Slater* (316 So.2d 539) and *Taylor* (294 So.2d 648).

2. It would be difficult to find every case in which the judge imposed a life sentence, or even all cases in which he overruled a jury recommendation of death, since such cases may not be appealed, the appeals do not usually come to the Supreme Court, and the sentence is unlikely to be in issue. Nonetheless, there are at least four established instances in which the death recommendation was overruled, *Rudolph Zadnik* (see Respondent's Appendix A), *Richard Cravero*, Case No. 75-2374 A, Dade County Circuit Court, *Ronald Chandler*, Case No. 75-2374 B, Dade County Court, *Roger Padron*, Case No. 76-1924, Broward County Circuit Court (copies of these judgments and sentences are enclosed for the convenience of the court.)

3. In *Proffitt v. Florida*, 49 L.Ed.2d 913 at 923 (1976), this Court noted that eight

Overall, the Florida Supreme Court has rendered thirty-three decisions in death cases, and affirmed nineteen. Twenty-one of these thirty-three, and at least four more from *Footnote* 2 received death recommendations. That Petitioner's case did not qualify for mercy was simply due to the heinous nature of what he did, as this Court recognized in *Proffitt v. Florida*, 49 L.Ed.2d 913 (1976), *Footnote* 12 at 925, but

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of twenty-one sentences had been reversed on appeal. Since then six more reversals have followed, including *Lee v. State*, Case No. 47,690, Opinion filed December 9, 1976, *Chambers, Provence* and *Jones* (see *Footnote* 1, *supra*), *Tibbs v. State*, 337 So.2d 788 (Fla. 1976), and *Miller v. State, supra*. Six death sentences have been affirmed, including *Adams v. State*, Case No. 45,450, Opinion filed December 16, 1976, *Funchess v. State*, Case No. 47,828, Opinion filed December 9, 1976, *Meeks v. State*, 339 So.2d 186 (Fla. 1976), *Knight v. State*, 338 So.2d 201 (Fla. 1976), *Meeks v. State*, 336 So.2d 1142 (Fla. 1976), and *Cooper v. State*, 336 So.2d 1133 (Fla. 1976).

the fact that the new procedure favors defendants demonstrates that it is not ex post facto.

Petitioner argues that the jury recommendation to mercy in his case would have produced a life sentence under the old procedure. This is speculation on his part, because his jury would not have had the benefit of the aggravation-mitigation hearing provided by Section 921.141, Florida Statutes, or the instructions of the Court. Petitioner's counsel would surely not have been allowed to read Nizer's account of the execution of the Rosenbergs in a single stage trial. Yet that was virtually the only matter presented in mitigation. (JA 47, 49-62) It cannot be said with certainty what his jury would have recommended under the old procedure, but it is clear that the old procedure could not have been applied to

Petitioner without any change because it did not pass constitutional muster under *Furman v. Georgia*, 408 U S 238 (1972). The majority opinions in *Furman* are replete with references to the unconstitutionality of death sentences imposed under statutory arrangements providing unbridled discretion to judge or jury. Surely Petitioner does not contend he had the right to be sentenced under an unconstitutional procedure.

Petitioner seems to contend that capital punishment was completely abolished by *Furman, supra,* and the resulting Florida decisions. It is far from clear that any such contention is properly preserved for this Court's consideration.[4] Further,

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4. Petitioner's pretrial motions simply alleged great confusion in the law. (A 7,8-9) When counsel stated objections to the capital trial, before jury selection (TR 25), and again before the advisory verdict proceeding

Petitioner reads more into *Furman* and its progeny than exists.

True it is that this Court's pronouncement in *Furman, supra,* generated some confusion, but careful reading of resulting Florida decisions establishes a fairly clear pattern. *Furman* plainly invalidated all existing death sentences, which produced *Anderson v. State,* 267 So.2d 8 (Fla. 1972) and *In re Baker,* 267 So.2d 331 (Fla. 1972). Faced with the problem of the status of the death penalty between the effective date of

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(JA 20), he hardly made the basis for his objection clear. Even the Petition for Writ of Certiorari filed in this Court does not contain this argument, but relies instead on the fact that a jury recommendation to mercy would have been binding when the crime occurred, and the alleged denial of equal protection. Under decisions such as *Cardinale v. Louisiana,* 394 U S 437 at 439 (1969), it would appear to be a bit late for Petitioner to raise new arguments.

Furman and the effective date of Florida's new statute, the court held that capital punishment was abolished in the interim, *Donaldson v. Sack,* 265 So.2d 499 (Fla. 1972). That is why the *Prince* alluded to in Petitioner's *Footnote* 15 was not subjected to the possibility of capital punishment. His crime occurred during the interim period. In like manner, the Akins of *Akins v. State,* 202 S E 2d 62 (Ga. 1973), committed his crime during Georgia's interim period.

On the first occasion the court had to consider the status of offenses committed before *Furman,* the court made it clear that capital crimes had not been completely obliterated. In *State ex rel. Manucy v. Wadsworth,* 293 So.2d 345 (Fla. 1974), the court not only held that the statute of limitations for capital crimes remained in effect, but also held that Manucy had to be indicted for his capital offense.

Florida's First District Court of Appeal had already concluded that capital punishment remained viable in *State v. Lee*, 286 So.2d 596 (Fla. 1 DCA 1973), and it should be no surprise that the Supreme Court agreed, *Lee v. State*, 294 So.2d 305 (Fla. 1974). That Petitioner's continued reliance on *Donaldson, supra*, is misplaced is evident from *Lowe v. Stack*, 326 So.2d 1 (Fla. 1974), which again limits application of *Donaldson* to the interim period.

It is respectfully submitted that the First District correctly assessed the effect of *Furman*, to wit:

> "'[T]he imposition and carrying out of the death penalty in these cases constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.'" 286 So.2d at 597-598

It would have been a futile gesture to try to save the existing Florida procedure when a new procedure had already been enacted

by the legislature, but it could and undoubtedly would have been done had the legislature taken no action. For example, the Circuit Judges could have collectively established and utilized guidelines for the jury's guidance, or the Florida Supreme Court could have achieved the same result through their Standard Jury Instructions or Rules of Procedure. Appellate review of death sentences could have been provided by the simple expedient of receding from the court-established rule that sentences within statutory limits are not reviewable. See e.g., *Stanford v. State*, 110 So.2d 1 at 2 (Fla. 1959). It is simply inaccurate to say that the demise of capital punishment, or even Florida's old statute, was compelled by *Furman* or its progeny.

Wisconsin's amicus brief suggests that the jury is the conscience of the community, so should have a greater voice in the

ultimate decision on life or death. Petitioner's advisory verdict notwithstanding, it hardly appears that his jury deemed his case appropriate for "mercy". Petitioner has graciously provided this Court with evidence that his jurors considered a life sentence harsher than death for him, so that he would have to live with the knowledge of what he had done to his own children. One juror is quoted as saying "I've heard what they do to child molesters in prison and I think a life of that treatment is worse than death."(Petitioner's Appendix C 34c)

In view of the weight given to Florida's advisory verdicts, it cannot be said that Florida does not recognize the role of the jury as the conscience of the community. Undoubtedly, Florida could have made the jury recommendation binding, as did Georgia (approved in *Gregg v. Georgia*, 49 L.Ed.2d 859 (1976). The simple fact is that

Petitioner was processed under a procedure upheld by this Court in *Proffitt*. It is the procedure which was in effect when he stood trial. It is respectfully submitted that Petitioner was entitled to no more. In *Gibson v. Mississippi*, 152 U S 565 at 590 (1896), this Court said:

> "* * * The inhibition upon the passage of *ex post facto* laws does not give a criminal a right to be tried, in all respects, by the law in force when the crime charged was committed. The mode of trial is always under legislative control, subject only to the condition that the legislature may not, under the guise of establishing modes or procedure and prescribing remedies, violate the accepted principles that protect an accused person against *ex post facto* enactments.* * *." at 591

To summarize, Petitioner's theory that his sentencing procedure was an ex post facto application is without merit. Only the procedure changed, not the punishment imposable. Accordingly, despite all of

Petitioner's speculations about what might have happened under other procedure, there was no ex post facto violation.

The Equal Protection Argument

For purposes of his equal protection argument, Petitioner would like to divide all of Florida's capital cases into those committed before *Furman*, and those committed after Florida's new procedure became effective. Even that division may not avail him, because many persons who committed capital crimes before *Furman* were executed. Respondent would submit the correct division is between those already sentenced when *Furman* invalidated existing death penalties, and those subsequently tried for capital offenses.

Petitioner argues that it is irrational to decide his legal status based on his

date of trial, but if so, then how does he explain *Johnson v. New Jersey*, 384 U S 719 (1966), which applied the dictates of *Miranda* only to those defendants coming to trial after the date of the decision?

Viewing the operation of any statute for a limited period of time may create the impression that it affects so few people as to deny equal protection, but that is not automatically so. Respondent will simply note that Petitioner is not the only pre-Furman offender still subject to the possibility of the death penalty. The Miller of *Miller v. State, supra,* is again before the Florida Supreme Court in Case No. 50,606, and others are still working their way through the Florida Courts, including the Dalton of *Baker and Dalton v. State,* 202 So.2d 563 (Fla. 1967), who has not yet been retried. There are undoubtedly others in other jurisdictions.

Petitioner's reliance on *Lee v. State*, Case No. 47,690, Opinion of Supreme Court filed December 9, 1976, is plainly misplaced. Lee had in fact been sentenced to death before *Furman*. It was a denial of equal protection to subject him to the death penalty since all others with pending death sentences were resentenced to life. Petitioner simply was not in that class.

True it may be that persons fully deserving the death sentence have escaped their just rewards as a result of having already been sentenced, but this Court recognized in *Proffitt v. Florida, supra*, 49 L.Ed.2d at 924 and *Footnote* 16 at 927 that this was not grounds to invalidate capital punishment. And Petitioner should not be heard to complain that he was not tried sooner. He can only blame himself for that, having hidden his gruesome acts

by lying to investigators, fabricating a suicide in Fort Lauderdale, and fleeing to parts unknown, moving on every time he was in danger of discovery.

It is absurd for Petitioner to discuss what might have happened to his wife had she been prosecuted sooner. She was not prosecuted and could not have been, since her alibi was ironclad. She was in jail while Petitioner killed their children.

Petitioner also relies on Article X, Section 9, of the Florida Constitution, which has been held to "save" the application of criminal statutes subsequently repealed or amended. But the new statute does not effect a substantive change in the offense or the punishment, and the provision does not apply to procedural changes. *Lee v. State*, 129 Fla. 319, 174 So. 589 (1937), *Mathis v. State*, 31 Fla. 291, 12 So. 681 (1893).

THE TOTALITY OF THE CIRCUMSTANCES SURROUNDING THE PETITIONER'S TRIAL DOES NOT SHOW INHERENT PREJUDICE IN THE PRETRIAL SETTING AND JURY SELECTION PROCESS TO THE EXTENT THAT THE PETITIONER WAS DENIED DUE PROCESS OF LAW.

Respondent relies on this Court's recent decision in *Murphy v. Florida*, 421 U S 794 (1975), where this Court stated:

> "The constitutional standard of fairness requires that a defendant have 'a panel of impartial, "indifferent" jurors.' Irvin v. Dowd, 366 US, at 722, 6 L.Ed.2d 751, 81 S Ct 1639. Qualified jurors need not, however, be totally ignorant of the facts and issues involved.
>
> 'To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.' *Id.*, at 723, 6 L.Ed.2d

> 751, 81 S Ct 1639." at 799-800

The publicity on *Murphy* contained highly prejudicial material about unrelated offenses and convictions. Petitioner has not and cannot show what his publicity contained with a capacity to prejudice him which approaches that on *Murphy*.

At the hearing on Petitioner's motion for change of venue, the assistant state attorney simply sought to determine whether any of Petitioner's witnesses were aware of any matter given publicity which was not likely to come out at trial. None of the witnesses knew of any such material. (CV 19-21, 29-31, 34-35, 44, 49-50, 56-57, 66-67, 76, 90-92, 130-131, 156-157)

Had the prospective jurors read and heard every media account, and retained total recall, what would they know that did not come from the witness stand? The

jury heard from Petitioner's surviving son, who was featured in some stories, and from his neighbors. They heard that Petitioner had faked suicide and fled to Texas, where he was arrested.(TR 2060-2070) They heard that he had been questioned, given statements and even offered to help locate the bodies if given immunity.(TR 2337-2342, 2346-2359) They learned of the clues he provided as to the location of the bodies. (TR 2143) They learned of efforts by law enforcement officers to find the bodies. They learned that a capital case could be prosecuted even without a body, not only in voir dire and closing arguments, but also from the court's instructions.(TR 2534-2535) It cannot have come as a surprise to the jurors that the State worked very hard on the case and was seeking the ultimate penalty. It is respectfully submitted that the publicity, standing

alone, did not require a change of venue.

It must also be remembered that Murphy's trial judge did nothing to insulate prospective jurors from news coverage, or to limit discussion among prospective jurors. (See 421 U S at 803-804) Petitioner's trial judge entered an order March 12, 1974, prohibiting attorneys, witnesses and court personnel from releasing further statements about the case.(Petition 9) He instructed prospective jurors not to discuss the case. (TR 5-6) Trial jurors were instructed repeatedly not to discuss the case and to avoid media accounts.(See e.g., R 86) When the trial began, the jury was sequestered.(TR 1404-1406)

Petitioner had thirty-two peremptory challenges available. When the jury was accepted he had five remaining. This alone demonstrates that he did not encounter that degree of hostility which would make it

impossible to select a fair jury. The voir dire bears this out. (See Respondent's Appendix E, which Petitioner apparently accepts as accurate.) Of the eighty-eight prospective jurors examined (including selection of alternate jurors), fifteen had never heard of Petitioner or his case. Twenty-two more had heard of him, but had formed no opinion. Twelve had heard enough to form an opinion which they thought could be set aside. Only twenty-four, less than one-third, expressed any great difficulty in setting aside the opinion that had formed from what they heard.

By Respondent's count, of the eighty-eight prospective jurors, the defense excused twenty-seven, and the State excused nineteen. Of the twenty-five excused for cause, four were for hardship reasons and two were excused under *Witherspoon v. Illinois*, 391 U S 510 (1968), for fixed

views on the death penalty. Thus, only nineteen were excused for prejudice against Petitioner, one based not on the media, but on personal knowledge, and some if not all based in part on the prejudice inherent in the charges, prejudice which could not have been avoided wherever the case was tried.

Comparing *Murphy* again, all seventy-eight of his prospective jurors had heard of him. Twenty were excused for cause for having prejudged him. (421 U S at 769) Just as some of *Murphy's* prospective jurors thought him innocent based on what they had heard, some of Petitioner's prospective jurors thought him innocent because the bodies were not found.

In all aspects, Petitioner's case falls short of the showing made in *Murphy*. If a change of venue was not required for "Murph the Surf", it certainly was not mandatory for Petitioner. To confirm this

conclusion, it is only necessary to review the deliberations of Petitioner's jury. They deliberated for over seven hours. (TR 2562, 2636) They requested reinstruction on lesser offenses and degrees. (TR 2562) They reheard the testimony of Petitioner's son (TR 2610), and two other witnesses (TR 2575). Their verdicts included two of guilty as charged and two for lesser degrees or offenses. Petitioner simply has not demonstrated that he was denied a fair and impartial jury.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision of the Florida Supreme Court, upholding Petitioner's judgment and sentence, should be affirmed.

Respectfully submitted,

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